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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Karla Kretsch, et al.,

10 Petitioners,

11 v.

12 Guy James Newman,

13 Respondent.
14

No. CV-21-02189-PHX-DWL

ORDER

15 Pending before the Court are Petitioner Karla Kretsch's ("Kretsch") petition for
16 confirmation of arbitration award (Doc. 1) and Respondent Guy James Newman's
17 ("Newman") motion to vacate arbitration award (Doc. 15). For the following reasons,
18 Kretsch's petition is granted and Newman's motion is denied.

19 **RELEVANT BACKGROUND**

20 In or around 2009, Newman registered with the Financial Industry Regulatory
21 Authority ("FINRA"). (Doc. 26 at 2.)

22 Between November 23, 2009 and March 23, 2011, Newman worked as a securities
23 salesperson for GVC Capital, LLC ("GVC"), a broker-dealer also registered with FINRA.
24 (Doc. 15-1 at 3; Doc. 20-2 at 3.) Kretsch was one of the GVC customers with whom
25 Newman interacted.

26 On March 1, 2011, while Newman was still working for GVC, Kretsch signed an
27 account application in which she agreed to be bound by the terms of GVC's customer
28 agreement. (Doc. 17-1 at 3.) The customer agreement included an arbitration agreement

1 that provided, in relevant part, as follows:

2 ANY AND ALL CONTROVERSIES, DISPUTES OR CLAIMS
3 BETWEEN YOU AND [GVC], OR THE INTRODUCING BROKER,
4 AGENTS, REPRESENTATIVES, EMPLOYEES, DIRECTORS,
5 OFFICERS OR CONTROL PERSONS OF [GVC] OR THE
6 INTRODUCING BROKER, ARISING OUT OF, IN CONNECTION
7 WITH, FROM OR WITH RESPECT TO (a) ANY PROVISIONS OF OR
8 THE VALIDITY OF THIS CUSTOMER AGREEMENT OR ANY
9 RELATED AGREEMENTS, (b) THE RELATIONSHIP OF THE PARTIES
10 HERETO, OR (c) ANY CONTROVERSY ARISING OUT OF [GVC's]
BUSINESS, THE INTRODUCING BROKER'S BUSINESS OR YOUR
ACCOUNTS, SHALL BE CONDUCTED PURSUANT TO THE CODE OF
ARBITRATION PROCEDURE OF THE NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.

11 (*Id.* at 12-13.)

12 During Newman's tenure with GVC, he recommended three investments that
13 Kretsch purchased. (Doc. 15-1 at 3; Doc. 20-1 at 5-6.)

14 After Newman left GVC in March 2011, he began working for non-FINRA
15 companies as an unlicensed consultant. (Doc. 15-1 at 7.) Meanwhile, Kretsch maintained
16 her brokerage account with GVC and continued to communicate with Newman. (Doc. 20-
17 1 at 6-7.) Between May 2011 and March 2012, Newman recommended five more
18 investments that Kretsch purchased. (Doc. 15-1 at 3; Doc. 20-1 at 6-7.)

19 According to Kretsch, after making these investments, she periodically sought
20 updates from Newman and "expressed concern about not getting any of her money back."
21 (Doc. 20-1 at 8.) In response, Newman allegedly "repeatedly told [Kretsch] to 'stay the
22 course' and that if anything happened [he] would 'make her whole' . . . [while] fully aware
23 of the fact that [Kretsch] had learned that the reason she was not feeling well is that she
24 had a life-threatening autoimmune condition that required expensive chemotherapy
25 treatments." (*Id.*) Eventually, Kretsch and Newman entered into a tolling agreement under
26 which they agreed that any claims by Kretsch would be deemed filed as of July 18, 2019.
27 (Doc. 15-1 at 7.)

28 On June 12, 2020, Kretsch filed a Statement of Claim against Newman and GVC

1 requesting arbitration before a FINRA arbitration panel (the “Panel”). (Doc. 20-1.) In the
2 statement, Kretsch asserted claims for securities fraud, negligence, breach of fiduciary
3 duty, breach of trust, breach of agency, negligent supervision, control person liability,
4 constructive fraud, negligent misrepresentation, violations of the Arizona Investment
5 Management Act, and breach of contract. (*Id.* at 11-19.) Acknowledging the time lapse
6 between the eight investments at issue and the filing of the Statement of Claim, Kretsch
7 alleged that Newman and GVC “provided false assurances to [her] to conceal their
8 wrongdoing with the intended strategy to ultimately run the clock out on her.” (*Id.* at 8-9.)

9 On September 25, 2020, GVC filed a motion to dismiss, arguing, in part, that
10 Kretsch’s claims were subject to a six-year limitations period under FINRA Rule 12206
11 and therefore time-barred. (Doc. 20-2.) The lengthy motion included an extensive
12 discussion of cases offered to support GVC’s position. (*Id.* at 2-18.)

13 On October 15, 2020, Newman filed a separate motion to dismiss. (Doc. 20-3 at 4-
14 10.) He, too, argued that all of Kretsch’s claims were time-barred (because they were based
15 on purchases made more than six years before the July 18, 2019 date specified in the tolling
16 agreement) and provided legal citations in support of his position. (*Id.*) Additionally,
17 Newman separately asserted that “only three of the eight transactions described in the
18 Statement of Claim transpired while Respondent Newman was an associated person and,
19 therefore, only those three transactions are eligible for FINRA arbitration as to Respondent
20 Newman. If this motion is not granted and the matter proceeds to a hearing, Respondent
21 Newman affirms that he does not consent to FINRA arbitration or jurisdiction with respect
22 to the [five] transactions that occurred after March 2011, which is when he severed his
23 registration with Respondent GVC Capital and became unlicensed.” (*Id.* at 6.)

24 On October 29, 2020, Kretsch filed a response to GVC’s motion to dismiss. (Doc.
25 1 at 7.) Later, on November 16, 2020, Kretsch filed a response to Newman’s motion to
26 dismiss. (Doc. 15-2 at 2-15.) As for the timeliness issue, Kretsch argued that “FINRA
27 guidance, case law, and . . . principles of equity are clear that the six-year rule (Rule 12206)
28 is not triggered by purchase dates and is not an automatic bar.” (*Id.* at 3.) Kretsch then

1 identified an array of authorities, including the decision in *Mid-Ohio Securities v. Estate of*
2 *Burns*, 790 F. Supp. 2d 1263 (D. Nev. 2011), that purportedly supported her position. (*Id.*
3 at 3-11.) Kretsch also identified reasons why the cited authorities in Newman’s brief
4 should be considered inapposite. (*Id.* at 11-13.) Finally, as for the separate issue of whether
5 Newman could be required to arbitrate her claims arising from all eight transactions (versus
6 only the claims arising from the three transactions that occurred while Newman was still
7 employed by GVC), Kretsch identified various reasons why Newman should be required
8 to arbitrate everything, including that Newman “consented to jurisdiction such that he has
9 now waived his argument” by participating “in all aspects of this dispute,” including a pre-
10 hearing conference. (*Id.* at 13-14.)

11 On November 25, 2020, Newman filed a reply in support of his motion to dismiss.
12 (Doc. 16-1 at 2-10.) The reply focused almost exclusively on the merits of the timeliness
13 issue under Rule 12206. (*Id.* at 2-9.) In the final paragraph before the conclusion, Newman
14 added: “Respondent Newman has not consented to FINRA arbitration or jurisdiction with
15 respect to any transactions that occurred after he severed his registration with Respondent
16 GVC Capital and became unlicensed.” (*Id.* at 9.)

17 On November 9 and 30, 2020, respectively, the Panel heard oral argument on
18 GVC’s and Newman’s motions to dismiss. (Doc. 1 at 7.) The Panel ultimately denied both
19 motions. (*Id.*)

20 On March 8, 2021, GVC filed a motion asking FINRA’s Arbitration Director to
21 remove all three members of the Panel. (Doc. 20-6 at 2-11.) Among other things, GVC
22 took issue with the Panel’s failure to “explain the basis/rationale for” its order denying
23 GVC’s motion to dismiss, argued that “the facts and law are so clear that dismissal was
24 required by FINRA rule,” and stated that these circumstances suggested the Panel must be
25 biased or lack impartiality. (*Id.* at 3-6.)

26 On March 31, 2021, FINRA’s Arbitration Director denied GVC’s removal
27 application. (Doc. 20-7.)

28 On October 13, 2021, Kretsch filed a notice of settlement with GVC, which was

1 thereafter dismissed from the arbitration proceeding. (Doc. 1 at 7.)

2 On December 5, 2021, the Panel issued its award, ordering Newman to pay Kretsch
3 \$67,572 in compensatory damages. (*Id.*) The Panel also found that even though “Newman
4 did not file a properly executed Submission Agreement” with respect to the arbitration
5 proceeding, he was “required to submit to the arbitration pursuant to the Code . . . and,
6 having answered the claim, appeared, and testified at the hearing, is bound by the
7 determination of the Panel on all issues submitted.” (*Id.*)

8 On December 21, 2021, Kretsch filed the pending petition for confirmation of the
9 arbitration award. (Doc. 1.)

10 On February 23, 2022, Newman filed the pending motion to vacate. (Doc. 15.)

11 On March 7, 2022, Kretsch filed a response to the motion to vacate. (Doc. 20.)

12 On March 14, 2022, Newman filed a reply. (Doc. 21.)

13 On August 4, 2022, the Court issued a tentative ruling. (Doc. 23.)

14 On August 18, 2022, the Court heard oral argument. (Doc. 24.) At the conclusion
15 of oral argument, the Court solicited supplemental briefing from the parties concerning
16 whether Newman was required to arbitrate all of Kretsch’s claims. (*Id.*)

17 On September 1, 2022, the parties filed their supplemental briefs. (Docs. 25, 26.)

18 DISCUSSION

19 I. Legal Standard

20 The parties agree that the Federal Arbitration Act (“FAA”) supplies the relevant
21 standards for deciding whether the arbitration award should be confirmed or vacated.

22 Under § 9 of the FAA, a confirmation application “must” be granted “unless the
23 award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”
24 9 U.S.C. § 9. *See also Bosack v. Soward*, 586 F.3d 1096, 1102 (9th Cir. 2009). Section
25 10(a), in turn, identifies four grounds on which an award may be vacated: (1) “where the
26 award was procured by corruption, fraud, or undue means”; (2) “where there was evident
27 partiality or corruption in the arbitrators, or either of them”; (3) “where the arbitrators were
28 guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or

1 in refusing to hear evidence pertinent and material to the controversy; or of any other
 2 misbehavior by which the rights of any party have been prejudiced”; or (4) “where the
 3 arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and
 4 definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a).
 5 Meanwhile, § 11 identifies three grounds on which an award may be modified or corrected:
 6 (1) “[w]here there was an evident material miscalculation of figures or an evident material
 7 mistake in the description of any person, thing, or property referred to in the award”; (2)
 8 “[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a
 9 matter not affecting the merits of the decision upon the matter submitted”; or (3) “[w]here
 10 the award is imperfect in matter of form not affecting the merits of the controversy.” *Id.*
 11 § 11. Here, the sole provision on which Newman relies is § 10(a)(4)—he argues the award
 12 must be vacated because “the arbitrators exceeded their powers . . . by entering an award
 13 on claims that i) were time-barred by the tribunal’s own statute of repose and ii) were
 14 outside the scope of the agreement to arbitrate.” (Doc. 15 at 1.)

15 As the Ninth Circuit has explained, arbitrators “exceed their powers” for purposes
 16 of § 10(a)(4) only “when they express a ‘manifest disregard of law,’ or when they issue an
 17 award that is ‘completely irrational.’ For an arbitrator’s award to be in manifest disregard
 18 of the law, it must be clear from the record that the arbitrator recognized the applicable law
 19 and then ignored it.” *Bosack*, 586 F.3d at 1104 (cleaned up). “Moreover, to rise to the
 20 level of manifest disregard the governing law alleged to have been ignored by the
 21 arbitrators must be *well defined, explicit, and clearly applicable.*” *Collins v. D.R. Horton,*
 22 *Inc.*, 505 F.3d 874, 879-80 (9th Cir. 2007) (cleaned up). Newman bears the burden of
 23 establishing that vacatur is proper. *U.S. Life Ins. Co. v. Superior Nat’l Ins. Co.*, 591 F.3d
 24 1167, 1173 (9th Cir. 2010).

25 As these standards make clear, “[n]either erroneous legal conclusions nor
 26 unsubstantiated factual findings justify federal court review of an arbitral award under the
 27 statute.” *Bosack*, 586 F.3d at 1102 (citations and internal quotation marks omitted). A
 28 court’s “review of an underlying arbitration decision . . . is both limited and highly

1 deferential.” *Coutee v. Barington Cap. Grp., L.P.*, 336 F.3d 1128, 1132 (9th Cir. 2003)
 2 (citations omitted). Thus, it “is not enough . . . to show that the panel committed an error—
 3 or even a serious error.” *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671
 4 (2010). A panel’s award demands deference because “[b]road judicial review of arbitration
 5 decisions could well jeopardize the very benefits of arbitration, rendering informal
 6 arbitration merely a prelude to a more cumbersome and time-consuming judicial review
 7 process.” *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 998 (9th Cir.
 8 2003) (en banc).

9 II. Merits

10 Newman argues that the arbitrators exceeded their powers by entering an award on
 11 claims that were (1) time-barred by FINRA’s six-year eligibility rule and (2) partially
 12 outside the scope of the agreement to arbitrate. (Doc. 15 at 1.)

13 A. **Eligibility & FINRA Rule 12206(a)**

14 1. The Parties’ Arguments

15 Newman argues that he provided the Panel with citations to previous FINRA
 16 arbitration awards in which arbitrators interpreted the phrase “occurrence or event” in
 17 FINRA Rule 12206(a) to be the event that *created* the cause of action, in each case, the
 18 *purchase* of the investments. (*Id.* at 4-6.) Thus, Newman contends that because Kretsch
 19 made all eight purchases between June 2010 and March 2012, all of her claims fell outside
 20 the six-year window (based on the June 2019 tolling date). (*Id.*) Newman also argues that
 21 Rule 12206 does not allow for stopping the clock until a reasonable investor is on notice
 22 of the claim. (*Id.* at 6.)

23 Kretsch responds that the Panel did not exceed its powers with respect to the six-
 24 year eligibility rule because it was empowered, under *Howsam v. Dean Witter Reynolds*,
 25 537 U.S. 79 (2002), to resolve any questions about the eligibility of a claim; because
 26 FINRA’s Director denied GVC’s interlocutory appeal of the Panel’s eligibility
 27 determination, thereby “indicating that allowing [Kretsch’s] claims to proceed was not an
 28 abuse of the arbitrators’ discretion”; and because the Panel correctly determined under

1 *Mid-Ohio Securities v. Estate of Burns*, 790 F. Supp. 2d 1263 (D. Nev. 2011), that the six-
 2 year eligibility rule did not begin to run at the date of purchase, but rather was “tolled by
 3 Newman’s ongoing fraud and false assurances.” (Doc. 20 at 5-8.)

4 In reply, Newman argues that a majority of courts have held that Rule 12206 is an
 5 absolute bar to claims submitted for arbitration more than six years after the event which
 6 gave rise to the dispute (here, the purchase of the investments), that the eligibility rule “is
 7 not subject to equitable tolling due to allegations of fraudulent concealment,” and that *Mid-*
 8 *Ohio Securities* is a wrongly-decided outlier. (Doc. 21 at 2-3.) Newman also argues that
 9 “Rule 12206(c) and (d) contemplate tolling for specific, limited purposes not relevant here,
 10 but such language is conspicuously absent from Rule 12206(a),” and that when the Panel
 11 was considering the pleadings, “there was no evidence of continuing fraud that constituted
 12 a continuing occurrence as now alleged.” (*Id.* at 3-4.)

13 2. Analysis

14 Newman has failed to meet his burden of establishing that the arbitrators “exceeded
 15 their powers,” as that term is construed under § 10(a)(4) of the FAA, by rejecting his
 16 argument that Kretsch’s claims were time-barred under FINRA Rule 12206(a).¹ As noted,
 17 arbitrators only exceed their powers when they express a “manifest disregard for the
 18 law”—which in turns requires a showing that the governing law was well defined, explicit,
 19 and clearly applicable and that the arbitrators recognized the governing law yet ignored
 20 it—or when they issue an award that is “clearly irrational.” *Bosack*, 586 F.3d at 1104;
 21 *Collins*, 505 F.3d at 879-80. Serious legal errors are not enough to establish manifest
 22 disregard or clear irrationality. *Stolt-Nielson S.A.*, 559 U.S. at 671.

23 In *Mid-Ohio Securities Corporation v. Estate of Burns*, 790 F. Supp. 2d. 1263 (D.
 24 Nev. 2011), the court addressed a nearly identical question. There, a customer of a broker-
 25 dealer made an investment of over \$300,000 in March 2002. *Id.* at 1265. The investment
 26

27 ¹ That rule provides: “No claim shall be eligible for submission to arbitration under
 28 the Code where six years have elapsed from the occurrence or event giving rise to the
 claim. The panel will resolve any questions regarding the eligibility of a claim under this
 rule.” See <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12206>.

1 eventually proved worthless. *Id.* In September 2009, over seven years after the investment
2 date, the now-deceased customer's estate filed a statement of claim with FINRA related to
3 the investment, arguing that the broker-dealer acted negligently by failing to perform due
4 diligence. *Id.* During the arbitration process, the broker-dealer argued the claims were
5 time-barred because they "were brought more than six years from the date the securities
6 were purchased," but the panel "denied the motion to dismiss without comment" and
7 eventually issued a \$280,683.50 award in the estate's favor. *Id.* at 1265-67. In the ensuing
8 confirmation proceeding in federal court, the broker-dealer moved to vacate on the ground
9 that "the panel manifestly disregarded the law because it allowed the claims to proceed
10 even though they were ineligible for arbitration under FINRA Rule 12206." *Id.* at 1269.
11 The district court rejected this argument and confirmed the award. Although the court
12 acknowledged that some cases supported the broker-dealer's proffered interpretation of
13 Rule 12206, it also noted that other cases seemed to support the arbitrators' interpretation.
14 *Id.* at 1270-71. Given this backdrop, the court concluded that "[t]he arbitrators did not
15 manifestly disregard the law for several reasons," including that "Mid-Ohio has not
16 established that the law it alleges the panel ignored was well defined, explicit, and clearly
17 applicable." *Id.* at 1271-72.

18 The Court finds this analysis persuasive. The question here isn't whether the
19 Panel's timeliness analysis regarding Rule 12206 was *correct*. This is a proceeding to
20 confirm an arbitration award, not an appeal. Thus, Newman may obtain vacatur under
21 § 10(a)(4) only by establishing that the law governing the timeliness inquiry was well-
22 defined and explicit, the Panel was aware of this settled law, and the Panel nevertheless
23 decided to ignore it. Newman has not made such a showing here. During the underlying
24 proceeding, both sides filed detailed briefs on the timeliness issue filled with cases and
25 authorities they viewed as supporting their respective positions. True, Newman's brief
26 identified several previous FINRA decisions adopting his preferred interpretation of Rule
27 12206, but Newman does not cite (and the Court cannot find) a Ninth Circuit case holding
28 that previous FINRA awards are binding on future panels. The Panel ultimately agreed

1 with Kretsch’s proposed interpretation, and Newman has not presented any evidence that
2 the Panel “ignored” the law in reaching this decision. It is also notable that, after GVC
3 complained about the denial of its dismissal motion and argued that the rejection of its
4 timeliness arguments could only have been motivated by bias or other improper
5 considerations, FINRA’s Arbitration Director denied GVC’s application to remove the
6 Panel members. (Docs. 20-6, 20-7.) This, too, undermines any suggestion that the Panel’s
7 ruling on the timeliness issue exhibited a manifest disregard for the law.

8 At any rate, as the court in *Mid-Ohio* recognized, there are reasonable grounds for
9 disagreement about whether Rule 12206(a) is subject to tolling and whether the relevant
10 event or occurrence from which the time period begins to run is the purchase of the
11 securities. The parties do not cite, and the Court cannot find, any subsequent Ninth Circuit
12 case expressly holding that Rule 12206 is *not* subject to tolling and/or that the triggering
13 event must be the purchase of the securities. Thus, Newman’s dissatisfaction with the
14 Panel’s ruling on these issues cannot provide the basis for vacatur under § 10(a)(4). *See,*
15 *e.g., Huitt v. Wilbanks Sec., Inc.*, 2017 WL 4697502, *5 (D. Colo. 2017) (“[B]ecause it was
16 for the Panel and not this Court to decide whether Plaintiff’s claims fell within Rule
17 12206(a)’s six-year timeframe, the Court rejects Defendant’s invitation to second-guess
18 the Panel’s interpretation of FINRA Rule 12206(a).”); *Oshidary v. Purpura-Andriola*,
19 2012 WL 2135375, *5 (N.D. Cal. 2012) (collecting cases, agreeing with *Mid-Ohio*’s
20 analysis, and holding “[t]he Panel was free to interpret Rule 12206 as it saw fit, in particular
21 with respect to the triggering date, i.e., the ‘occurrence or event giving rise to the claim,’”
22 particularly because there was no “well defined, explicit, and clearly applicable” law
23 regarding whether the triggering date must be the date of investment). *See also Cristo v.*
24 *Charles Schwab Corp.*, 2021 WL 6051825, *6 (S.D. Cal. 2021) (“The Court recognizes
25 Plaintiff’s dissatisfaction with the panel’s eligibility rulings; however, the Court may not
26 second-guess the panel’s interpretation of FINRA Rule 12206(a), even if erroneous. . . .
27 Therefore, Plaintiff’s numerous arguments concerning the Panel’s ruling . . . on the
28 eligibility of his claim under FINRA Rule 12206(a) are not subject to vacatur.”).

1 **B. Arbitrability**

2 1. The Parties' Arguments

3 Newman's final argument is that "the arbitrators exceeded their powers by
4 considering claims outside the scope of the agreement to arbitrate." (Doc. 15 at 6,
5 capitalization omitted.) Newman elaborates that "a party cannot be required to submit to
6 arbitration any dispute which that party has not agreed to submit" in contract. (*Id.* at 6-9.)
7 Newman contends that because five of the transactions at issue here occurred between May
8 2011 and March 2012, which is after he left GVC and was no longer licensed under FINRA,
9 it follows that he could not be required to arbitrate Kretsch's claims arising from those
10 transactions. (*Id.*) In the alternative to vacating the entire award, Newman asks the Court
11 to remand the case for determination of only the three claims arising while he was a
12 registered FINRA salesperson with GVC. (*Id.* at 9.)

13 Kretsch responds that the Panel did not exceed its powers because "consent to grant
14 the arbitrator such authority may be implied from the conduct of the parties in the
15 arbitration setting" and here, "Newman submitted to the arbitration by actively
16 participating in every step of the arbitration. Newman filed an answer and a motion to
17 dismiss, participated in the selection of and agreed to the composition of the panel, and
18 actively participated and was engaged in the two-day evidentiary hearing of this matter."
19 (Doc. 20 at 1-2, 9-10.) Kretsch assigns particular significance to the fact that Newman did
20 not limit himself to making an arbitrability challenge in his motion to dismiss but also
21 argued, in the alternative, that he should prevail on the merits. (*Id.* at 9.) Kretsch contends
22 that, under Ninth Circuit law, this means that Newman "consented to allow the arbitration
23 to decide the entire controversy." (*Id.*)

24 In reply, Newman acknowledges that there was an express arbitration agreement in
25 effect for the first three transactions but argues that after he left GVC and was no longer
26 licensed with FINRA, there were no express agreements in place. (Doc. 21 at 4-5.)
27 Newman also contends that his participation in the November 2021 hearing cannot be
28 viewed as consent to be bound because he had previously raised an express objection based

1 on arbitrability. (*Id.* at 5.)

2 During oral argument, the Court solicited supplemental briefing from the parties on
3 the arbitrability question. (Doc. 24.) In her brief, Kretsch identifies two grounds for
4 affirming the Panel’s finding of arbitrability. First, Kretsch argues that Newman was
5 required to arbitrate all of her claims under FINRA Rule 12200 because the FINRA Code
6 defines the term “person associated with a member” to include “person formerly associated
7 with a member,” and thus Newman’s departure from GVC in 2011 didn’t interfere with
8 the arbitrability of claims arising in connection with his activities at GVC. (Doc. 25.)
9 Second, Kretsch argues that Newman was also required to arbitrate all of her claims
10 pursuant to the arbitration clause in her GVC customer agreement, even though he did not
11 sign that agreement, because (a) he previously conceded that he was bound by this clause;
12 and (b) even without this concession, he would be bound pursuant to the doctrines of direct
13 benefits estoppel and/or equitable estoppel. (*Id.*)

14 In his brief, Newman argues that he cannot be compelled to arbitrate based on
15 Kretsch’s customer agreement with GVC or the FINRA arbitration submission agreement
16 because he never signed either document. (Doc. 26 at 2.) In contrast, Newman
17 acknowledges that “[w]hen [he] registered with FINRA in 2009, he agreed, like all other
18 members, to comply with FINRA’s rules such as Rule 12200.” (*Id.*) Nevertheless,
19 Newman argues that FINRA Rule 12200 doesn’t require arbitration with respect to the five
20 claims that arose after he left GVC because (1) they “occurred after [he] was no longer
21 registered with FINRA and, therefore, that dispute is not between a customer and a
22 regulated associated person of a member”; and (2) “the FIVE Claims do not arise from the
23 business activities of the member (GVC) or the associated person.” (*Id.* at 3.)

24 2. Analysis

25 An arbitrability challenge is a potentially valid basis for seeking vacatur of an
26 arbitration award. *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir.
27 1995) (“When arbitrators rule on a matter not submitted to them, or act outside the scope
28 of the parties’ contractual agreement, the award may be overturned because the arbitrators

1 exceeded the scope of their authority.”). After all, “[a]rbitration is strictly a matter of
2 consent.” *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (internal
3 quotation marks omitted). Thus, “a party cannot be required to submit to arbitration any
4 dispute which he has not agreed so to submit.” *United Steelworkers of Am. v. Warrior &*
5 *Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). “While ambiguities in the language of [an]
6 agreement should be resolved in favor of arbitration, [courts] do not override the clear
7 intent of the parties, or reach a result inconsistent with the plain text of the contract, simply
8 because the policy favoring arbitration is implicated.” *E.E.O.C. v. Waffle House*, 534 U.S.
9 279, 294 (2002) (citation omitted).

10 One issue raised by Newman’s challenge is whether he implicitly authorized the
11 Panel to decide the question of arbitrability. The Court begins by addressing this issue
12 because its resolution helps define the resulting standard of review.

13 Parties may authorize an arbitrator, rather than a court, to resolve threshold
14 arbitrability questions. See, e.g., *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.
15 Ct. 524, 527 (2019). The Ninth Circuit has held that such an agreement may be implied
16 by the parties’ conduct. In *George Day Construction Company, Inc. v. United Brotherhood*
17 *of Carpenters & Joiners of America, Local 354*, 722 F.2d 1471 (9th Cir. 1984), an
18 employer sought to vacate an arbitration award, “assert[ing] that because the dispute arose
19 after the expiration of the collective bargaining agreement[,] the duty to arbitrate
20 terminated with the agreement” and the arbitrator accordingly lacked authority to enter the
21 award. *Id.* at 1474. During the arbitration, the employer contested both the arbitrator’s
22 authority and the merits of the dispute. *Id.* The Ninth Circuit affirmed. As an initial matter,
23 the court held that the employer’s conduct during the arbitration proceeding amounted to
24 implicit consent to allow the arbitrator to decide the threshold question of arbitrability:

25 The merits of the dispute along with the question of jurisdiction were fully
26 addressed by the parties during the arbitration proceeding and, at its
27 conclusion, the entire controversy was submitted to the arbitrator for
28 decision. Nowhere in the record is there any indication that the employer
reserved the question of arbitrability for initial determination in a judicial
forum. Under these circumstances, we conclude that the employer impliedly

1 consented to the arbitrator's deciding both the question of arbitrability and
2 the merits of the controversy.

3 *Id.* at 1475. The court also identified various ways in which the employer could have
4 avoided providing such implicit consent. *Id.* at 1475-76 (explaining that "the arbitrability
5 question would have been preserved for independent judicial scrutiny" if the employer had
6 "voice[d] its objection on the arbitrability issue and state[d] on the record that it was
7 reserving that question for later judicial determination" or "taken the initiative by seeking
8 declaratory and injunctive relief prior to the commencement of arbitration"). Finally, given
9 the determination that "the employer initially submitted the arbitrability question to the
10 arbitrator," the court held that "any subsequent judicial review [of the arbitrability
11 question] was narrowly circumscribed" and that the court was "not at liberty to substitute
12 our own view [on the arbitrability question] in place of the arbitrator's regardless what our
13 view might be of the correctness of the arbitral decision." *Id.* at 1476. More specifically,
14 the court held that it could only review the arbitrator's arbitrability determination under a
15 "deferential" and "narrow standard" that required affirmance "notwithstanding the
16 erroneousousness of any factual findings or legal conclusions, absent a manifest disregard of
17 the law." *Id.* at 1477. Applying these standards, the court held that "even assuming,
18 *arguendo*, that the arbitrator misinterpreted" the precedents bearing on the merits of the
19 arbitrability question, "we must defer to this interpretation. By consenting to the
20 arbitrator's consideration of the arbitrability question, the parties bound themselves to his
21 decision. They are bound even if the award resulted from a misinterpretation of law, faulty
22 legal reasoning or erroneous legal conclusion." *Id.* at 1479.

23 Kretsch argues that *George Day* compels a finding that Newman implicitly
24 authorized the Panel to decide the question of arbitrability. Recognizing that the issue
25 presents a somewhat close call, the Court disagrees. In his motion to dismiss filed at the
26 outset of the arbitration proceeding, Newman only argued that dismissal was warranted
27 due to untimeliness under Rule 12206(a). (Doc. 20-3 at 4-10.) Although the motion also
28 included a section explaining why Newman believed that some of Kretsch's claims fell

1 outside the scope of the arbitration agreement, Newman didn't ask the Panel to make a
2 ruling on the arbitrability issue or to partially dismiss Kretsch's claims based on this
3 alternative ground—instead, Newman simply clarified that “he does not consent to FINRA
4 arbitration or jurisdiction with respect to the . . . transactions that occurred after March
5 2011.” (*Id.* at 9-10.) Similarly, in his reply brief, Newman sought dismissal based solely
6 on the untimeliness issue and made clear that he “has not consented to FINRA arbitration
7 or jurisdiction with respect to any transactions that occurred after he severed his registration
8 with Respondent GVC Capital and became unlicensed.” (Doc. 16-1 at 9.)

9 Given this backdrop, there is no merit to Kretsch's contention that “Newman made
10 clear at the arbitration that he was hoping the panel would disregard certain claims because
11 of issues of arbitrability.” (Doc. 20 at 10.) The discussion of arbitrability in Newman's
12 motion-to-dismiss briefing is best viewed as an objection to the Panel's authority due to a
13 lack of arbitrability, not an invitation for the Panel to decide the question of arbitrability.
14 This is much different from *George Day*, where the employer “evinced clearly its intent to
15 allow the arbitrator to decide not only the merits of the dispute but also the question of
16 arbitrability” and never provided “any indication that [it] reserved the question of
17 arbitrability for initial determination in a judicial forum.” 722 F.2d at 1475. Although the
18 Panel included a ruling as to arbitrability in its final decision (Doc. 1 at 7 [“Newman . . . is
19 required to submit to arbitration pursuant to the Code of Arbitration Procedure . . . and,
20 having answered the claim, appeared, and testified at the hearing, is bound by the
21 determination of the Panel on all issues submitted.”])), the Court does not see how the
22 presence of this ruling could serve as proof of Newman's implicit consent to allow the
23 Panel to decide the issue. As noted, Newman never asked the Panel to decide the question
24 of arbitrability in his motion-to-dismiss briefing. And because the transcript of the final
25 hearing is not in the record, there is no evidence that Newman subsequently made an oral
26 request for the Panel to decide the issue.

27 Courts confronting similar conduct have declined to find implicit consent to allow
28 the arbitrator to decide the question of arbitrability. In *Coast Hotels & Casinos, Inc. v.*

1 *Culinary Workers Union Local 226*, 35 F. Supp. 2d 765 (D. Nev. 1999), although a party
2 submitted the merits of the grievance to arbitration, it “specifically objected to the
3 arbitrability issue, and only submitted the merits subject to its objection.” *Id.* at 769. The
4 court thus determined that the objecting party “did all that was necessary to preserve for
5 judicial determination the issue of whether the arbitrator had jurisdiction to decide the . . .
6 grievance.” *Id.* Similarly, in *Van Waters & Rogers v. Local Union 70*, 913 F.2d 736 (9th
7 Cir. 1990), the court found that Van Waters “carefully preserved its objections to
8 arbitrability, as required by *George Day*,” by stating that it was “only willing to grant the
9 Arbitrator has jurisdiction, over [certain] grievances filed . . . [and] the Arbitrator has no
10 jurisdiction and [we] are [not] willing to concede jurisdiction over [other grievances]. The
11 Arbitrator, may, accordingly, make no ruling affecting that facility, that contract, or that
12 [party].” *Id.* at 740. And again, in *Jacob v. First Collateral Services, Inc.*, 2008 WL
13 11338811 (D. Ariz. 2008), the court found that Jacob preserved the arbitrability
14 determination for the court, even though he “was involved in selection of the Arbitrator;
15 . . . appeared at the January 23, 2007 telephonic hearing before the Arbitrator; and . . . filed
16 a motion with the Arbitrator,” because he “still forcefully objected on several occasions to
17 the jurisdiction of AAA over the dispute . . . [and] unequivocally reserved the right to
18 challenge the jurisdiction of the arbitrator.” *Id.* at *5-6. Although Newman’s reservations
19 in this case may not have been quite as clear as the reservations in the above-cited cases—
20 he never explicitly stated that he objected to a Panel ruling on the issue of arbitrability—
21 he still did enough to “reserve[] the question of arbitrability for initial determination in a
22 judicial forum.” *George Day*, 722 F.2d at 1475.

23 This determination does not, however, mean the arbitration award must be vacated.
24 Instead, it simply means the Court need not defer to the Panel’s finding of arbitrability.
25 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“If, on the other hand,
26 the parties did *not* agree to submit the arbitrability question itself to arbitration, then the
27 court should decide that question just as it would decide any other question that the parties
28 did not submit to arbitration, namely, independently.”). And having independently

1 considered the issue, the Court concludes that Kretsch’s claims arising from the five post-
 2 March 2011 transactions were subject to arbitration.

3 a. **FINRA Rule 12200**

4 As noted, the Panel found that Newman was “required to submit to arbitration
 5 pursuant to the Code of Arbitration Procedure.” (Doc. 1 at 7.) It appears this was a
 6 reference to Rule 12200 of the FINRA Code.

7 Newman acknowledges that he agreed to be bound by Rule 12200 when he
 8 registered with FINRA in 2009. (Doc. 21 at 4; Doc. 26 at 2.) Thus, it is undisputed that a
 9 written agreement to arbitrate *existed* in this matter—the only dispute is whether all of
 10 Kretsch’s claims fell within the *scope* of that agreement. *See generally Goldman, Sachs &*
 11 *Co. v. City of Reno*, 747 F.3d 733, 739 n.1 (9th Cir. 2014) (“FINRA Rule 12200 constitutes
 12 an ‘agreement in writing’ under the FAA, and, assuming Reno is a customer, it is entitled
 13 to invoke FINRA Rule 12200 as an intended third-party beneficiary in its dispute with
 14 Goldman.”); *Pictet Overseas Inc. v. Helvetia Trust*, 905 F.3d 1183, 1187 (11th Cir. 2018)
 15 (“Despite the absence of a direct, written agreement, an agreement to arbitrate still may be
 16 found based on Pictet Overseas’s membership in FINRA. . . . When Pictet Overseas joined
 17 FINRA, it agreed, like all other FINRA members, to comply with FINRA’s rules. These
 18 rules include FINRA Rule 12200, which requires a FINRA member and its associated
 19 persons to arbitrate certain disputes with customers before FINRA upon the customer’s
 20 demand. Pictet Overseas’s agreement when joining FINRA thus may ‘itself constitute[]
 21 the agreement’ to arbitrate.”) (citations omitted).

22 Turning to the question of scope, Rule 12200 provides as follows:

23 Parties must arbitrate a dispute under the Code if:

- 24 • Arbitration under the Code is either:
 - 25 (1) Required by a written agreement, or
 - 26 (2) Requested by the customer;
- 27 • The dispute is between a customer and a member or associated
 person of a member; and
- 28 • The dispute arises in connection with the business activities of

the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

See <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12200>. Thus, questions of arbitrability under Rule 12200 are “determined by analyzing the three elements enumerated in the Rule. First, [whether] arbitration is requested by the customer Second, [whether] the dispute is between [a] customer[] and associated persons of a member. . . . Third, [whether] the dispute arises in connection with the business activities of the member or associated persons.” *Hull v. Bennett*, 2015 WL 1143857, *4 (C.D. Cal. 2015) (citations omitted).

The first element (“Requested by the customer”) was satisfied here because arbitration was requested by Kretsch, who easily qualified as a “customer.” *Goldman, Sachs*, 747 F.3d at 41 (for purposes of Rule 12200, “a ‘customer’ is a non-broker and non-dealer who purchases commodities or services from a FINRA member in the course of the member’s FINRA-regulated business activities, i.e., the member’s investment banking and securities business activities”).

As for the second element (“The dispute is between a customer and a member or associated person of a member”), Newman emphasizes that some of Kretsch’s claims arose from the five purchases that occurred after he left GVA and “was no longer registered with FINRA.” (Doc. 26 at 3.) This may be true, but Newman overlooks how the FINRA Code defines the term “Person Associated with a Member”:

The term “person associated with a member” means:

- (1) A natural person who is registered or has applied for registration under the Rules of FINRA; or
- (2) A sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not:

- 1 (A) Any such person is registered or exempt from
 2 registration with FINRA under the By-Laws or the
 3 Rules of FINRA; or
 4 (B) Any such person's registration is revoked, cancelled, or
 5 suspended, the person has been expelled or barred from
 6 FINRA, or the person's registration has been terminated
 7 for a minimum of 365 days.

8 ***For purposes of the Code, a person formerly associated with a member is***
 9 ***a person associated with a member.***

10 See FINRA Rule 12100(w) (emphasis added), available at [https://www.finra.org/rules-](https://www.finra.org/rules-guidance/rulebooks/finra-rules/12100)
 11 [guidance/rulebooks/finra-rules/12100](https://www.finra.org/rules-guidance/rulebooks/finra-rules/12100). As the bolded language makes clear, because
 12 Newman was “formerly associated” with GVC, which is a FINRA member, he continued
 13 to qualify as a “person associated with a member” for purposes of Rule 12200. Cf.
 14 *Raymond James Financial Services, Inc. v. Armijos*, 2020 WL 2026316, *7 (S.D. Fla.
 15 2020) (“[T]he relevant question at this juncture is whether a person formerly associated
 16 with a FINRA member can still be deemed an ‘associated person’ for purposes of triggering
 17 arbitration under Rule 12200. The Court answers this question in the affirmative, and the
 18 plain language of the FINRA Code, once again, favors Defendants’ interpretation. . . . It
 19 is undisputed that Chatburn was formerly associated with RJFS and initiated his solicitation
 20 of Defendants while affiliated. Because ‘formerly associated’ means ‘associated’ under
 21 the FINRA Code, Chatburn is an ‘associated person’ with RJFS for purposes of
 22 Defendants’ claims.”) (citations omitted).

23 Newman’s arguments regarding the third element (“The dispute arises in connection
 24 with the business activities of the member or the associated person, except disputes
 25 involving the insurance business activities of a member that is also an insurance company”) fail for similar reasons. Newman asserts that the last five transactions did not arise in
 26 connection with the business activities of a member because they “involved the purchase
 27 of stock and debt instruments from third parties, and not from a FINRA regulated party
 28 such as . . . GVC.” (Doc. 26 at 3.) However, the third element is not limited to disputes
 arising in connection with the business activities of “the member”—it also encompasses

1 disputes arising in connection with the business activities of “the associated person.” And
 2 as noted in the preceding paragraph, the FINRA Code broadly defines the term “associated
 3 person” to included individuals formerly associated with a member, such as Newman.
 4 Here, the last five claims clearly arose in connection with the business activities of
 5 Newman, so they are covered.²

6 For these reasons, Newman was properly required under Rule 12200 to arbitrate all
 7 of Kretsch’s claims.

8 **b. The Arbitration Clause In The Customer Agreement**

9 The arbitrability analysis in the tentative order issued before oral argument focused
 10 on the arbitration clause in Kretsch’s customer agreement with GVC, not Rule 12200. In
 11 light of the analysis regarding Rule 12200 set forth above, it is no longer necessary to
 12 address that clause’s applicability to Newman.

13 Nevertheless, in an abundance of caution, the Court clarifies that it views the
 14 arbitration clause in the customer agreement as providing an alternative basis for
 15 confirming the award. Although Newman contends in his supplemental brief that he was
 16 not bound by the arbitration clause in the customer agreement because he never signed it
 17 (Doc. 26 at 2), Newman took a different position during the merits briefing process,
 18 conceding that “[t]here is no dispute that Petitioner, Respondent Newman and GVC Capital
 19 entered into binding arbitration agreement in 2011” (Doc. 15 at 7.)³

20 Kretsch’s claims arising from the five post-March 2011 transactions fall within the
 21 scope of the arbitration clause in the customer agreement. It requires arbitration of all
 22 “controversies, disputes or claims” between Kretsch and “the introducing broker, agents,
 23 representatives, employees, directors, officers or control persons” of GVC “arising out of”
 24 or “in connection with” “the relationship of the parties hereto.” (Doc. 17-1 at 12-13.) Due

25 ² There is a strong argument that the final five transactions also arose “in connection
 26 with” the business activities of GVC, because they were inextricably intertwined with
 27 the first three transactions, but it is unnecessary to resolve that issue for purposes of
 evaluating Rule 12200’s applicability because the final five transactions so clearly arose
 “in connection with” the business activities of Newman.

28 ³ Given this concession, there is no need to address the new arguments in Kretsch’s
 supplemental brief regarding direct benefits estoppel and equitable estoppel.

1 to the inclusion of the phrases “arising out of” and “in connection with,” the clause sweeps
2 broadly. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (“Every court that
3 has construed the phrase ‘arising in connection with’ in an arbitration clause has interpreted
4 that language broadly. We likewise conclude that the language ‘arising in connection with’
5 reaches every dispute between the parties having a significant relationship to the contract
6 and all disputes having their origin or genesis in the contract.”). Accordingly, although the
7 five post-March 2011 transactions may have occurred after Newman stopped being
8 employed by GVC, those transactions still “ar[ose] out of” or “in connection with” the
9 “relationship” between Kretsch and Newman (as well as the “relationship” between
10 Kretsch and GVC) because they flowed from the relationship that was formed while
11 Newman was employed by GVC. Indeed, Kretsch asserted during the arbitration
12 proceeding that she was under the misimpression that Newman “was still associated with
13 . . . GVC” at the time he solicited the five post-March 2011 transactions. (Doc. 20-1 at 6.)
14 Additionally, one of the post-March 2011 transactions was clearly related to a pre-March
15 2011 transaction because it involved the same underlying company. (Doc. 16-1 at 8 [two
16 of the challenged transactions were a \$25,000 investment in October 2010 in “KBC Bricks
17 Common Stock” and a \$30,000 investment in May 2011 in “KBC Bricks Loan”].)

18 There is ample authority supporting a finding of arbitrability under these
19 circumstances. In *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers*
20 *Union*, 430 U.S. 243 (1977), the Supreme Court held that the obligation to arbitrate can
21 survive the termination of a collective bargaining agreement and that a presumption of
22 arbitrability applies unless negated expressly or by clear implication by the terms of the
23 contract. *Id.* at 255 (“where the dispute is over a provision of the expired agreement,” “the
24 parties’ failure to exclude from arbitrability contract disputes arising after termination, far
25 from manifesting an intent to have arbitration obligations cease with the agreement, affords
26 a basis for concluding that they intended to arbitrate all grievances arising out of the
27 contractual relationship”). There, the agreement provided that “‘any grievance’ arising
28 between the parties was subject to binding arbitration,” and the Court construed this broad

1 language as applying to grievances arising after termination of the contract. *Id.* at 245. *See*
2 *also Litton Fin. Printing Division v. NLRB*, 501 U.S. 190, 204 (1991) (recognizing a
3 “presumption in favor of postexpiration arbitration of matters unless ‘negated expressly or
4 by clear implication’ . . . [for] matters and disputes arising out of the relation governed by
5 contract”) (quoting *Nolde*, 430 U.S. at 255); *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d
6 1051, 1061 (9th Cir. 2020) (agreeing with other circuits that *Litton* applies in the FAA
7 context).

8 Courts have construed *Nolde* and its broad presumption of arbitrability of post-
9 expiration grievances as applying to grievances that “involve rights which to some degree
10 have vested or accrued during the life of the contract and merely ripened after termination,
11 or relate to events which have occurred at least in part while the agreement was still in
12 effect.” *Chauffeurs, Teamsters & Helpers, Loc. Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400,
13 1403 (8th Cir. 1986) (collecting cases); *see also Optimum Prods. v. Home Box Off.*, 839 F.
14 App’x 75, 77 (9th Cir. 2020) (“Every court that has construed the phrase ‘arising in
15 connection with’ in an arbitration clause has interpreted that language broadly, and we
16 likewise conclude that the language ‘arising in connection with’ reaches every dispute
17 between the parties having a significant relationship to the contract and all disputes having
18 their origin or genesis in the contract. Thus, to require arbitration, [the party’s] factual
19 allegations need only ‘touch matters’ covered by the contract.”) (cleaned up). Here, the
20 claims based on the five post-March 2011 transactions “arose out of” or “in connection
21 with” the “relationship” between Kretsch and Newman that came into effect while the
22 arbitration agreement was still in place. Additionally, the arbitration agreement did not
23 expressly exclude disputes arising after contract termination.

24 For these reasons, the arbitration clause provides an additional basis for concluding
25 that Newman was properly required to submit to arbitration with respect to all of Kretsch’s
26 claims.

27 ...

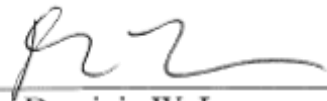
28 ...

1 Accordingly,

2 **IT IS ORDERED** that Kretsch's petition for confirmation (Doc. 1) is **granted** and
3 Newman's motion to vacate (Doc. 15) is **denied**.

4 **IT IS FURTHER ORDERED** that a separate judgment will issue, after which the
5 Clerk shall terminate this action.

6 Dated this 6th day of September, 2022.

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10 _____
11 Dominic W. Lanza
12 United States District Judge
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